

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 58 OF 2000.

Shri Assis Colaco,
Central Jail, Aguada.

... Appellant.

Versus

State of Goa.

... Respondent.

Mr. J. Godinho, Advocate for the Appellant under L.A.S.

Mr. A.P. Lawande, Public Prosecutor for the Respondent
State.

Coram: A.S. AGUIAR AND
P.V. HARDAS, JJ.
Date: 5th February 2002.

ORAL JUDGMENT (PER HARDAS, J.)

Angered by the act of the deceased, Shashikant Kawade, in slapping one of the accused, the appellant and original accused no. 1 Shamsuddhin A. Shaikh threatened the deceased and ultimately on the same day, that is, on 18th May 1998 at about 8.15 p.m. committed the murder of deceased Shashikant. On this allegation the appellant and the original accused no. 1 Shamsuddhin stand convicted by the Additional Sessions Judge, South Goa, Margao, by Judgment dated 22nd February 2000 in Sessions Case No. 20 of 1998. The appellant, who is the original accused no. 2, has alone preferred the appeal while the original accused no. 1 Shamsuddhin, son of Abdul Razak Shaikh, has chosen not to challenge his conviction. The appellant is sentenced to suffer imprisonment for life.

2. In response to a telephonic message received by P.S.I. S.D. Naik, at about 8.35 p.m. on 18th May 1998,

P.W. 16 Vaman Tari, who was working as P.I. and in-charge of Margao Town Police Station, proceeded to the scene of the offence. Later on at about 11.30 p.m. an F.I.R., Exhibit P.W.1/A, came to be filed by P.W.1 Smt. Amlī Kawade, wife of the deceased. On the basis of the said complaint an offence vide Crime No. 221 of 1998, under Section 302 read with Section 34 of the Indian Penal Code against the appellant and the original accused no. 1 Shamsuddhin came to be registered. The appellant and the original accused no. 1 Shamsuddhin were admitted in the hospital because of the injuries received by them due to the beating given by the persons who had apprehended them, came to be arrested on 19th May 1998 at about 7.00 a.m. and 20th May 1998 respectively. P.W.10/A is the arrest/attachment panchanama of the appellant, evidencing the attachment of his clothes in the presence of P.W.10 Shantaram Mane. The clothes which came to be attached by the said panchanama is a black T-shirt and blue colour trouser. Thereafter, P.W.16 P.I. Tari instructed P.W.15 P.S.I. Uttam Raut Dessai to conduct the inquest panchanama of the dead body of the deceased Shashikant. P.W.15 P.S.I. Uttam conducted the inquest panchanama of deceased on 19th May 1998 vide Exhibit P.W.3/A in the presence of P.W.3 Srirang Kavde. Subsequently P.W.15 P.S.I. Uttam attached the clothes of the deceased vide panchanama Exhibit P.W.10/A in the presence of P.W.10 Shantaram Mane. The dead body of Shashikant was sent for

autopsy examination and the autopsy was performed by P.W.4 Dr. Avinash Pujari, whose postmortem report is at Exhibit P.W.4/A. P.W.4 Dr. Pujari has opined that death was caused on account of haemorrhage and shock due to penetrating incised stab wound on the chest involving heart. On dissection of the incised wound P.W.4 Dr. Pujari had noticed that the penetrating incised stab wound had pierced the skin and underlying subcutaneous and muscles. It further pierced the fifth rib near cartilage and lower edge slit like, injured parietal pleura entered chest cavity, injured pericardium near tip slit like about 2 cms. in length. It had pierced the musculature of left ventricle near tip/slit like width 1.5 cms. length through and through and entered the left ventricular cavity. On the same day, that is, 19th May 1998, P.W.16 P.I. Tari had conducted the scene of offence panchanama and had drawn a sketch, which are at Exhibit P.W.5/A copy. The scene of offence panchanama was conducted in the presence of P.W.5 Mohammad Gawas Khan. From the scene of offence one G.I. pipe piece, knife, pair of old chappals, blood stained mud and control sample of mud were attached. P.W.16 P.I. Tari had then called the photographer P.W.6 Ganadeep Sheldekar, who had taken photos of the scene of offence and had also taken photos of the dead body at the morgue after the postmortem. On 20th May 1998 P.W.16 P.I. Tari had recorded the statement of Savio Monteiro and on 21st May 1998 he had

recorded the statements of P.W.2 Rafik Gondi and others. On 23rd May 1998 P.W.16 P.I. Tari had received the sketch of the scene of offence drawn by P.W.8 Vinod Naik in response to the letter sent by P.W.16 P.I. Tari, which is at Exhibit P.W.8/A. The sketch/map drawn by P.W.8 Naik is at Exhibit P.W.8/B. On 24th May 1998 the original accused no. 1 Shamsuddhin was arrested vide arrest panchanama at Exhibit P.W.7/A. The arrest was effected by P.W.14 P.S.I. Ganpat Oskar in the presence of P.W.7 Viswas Chari. On 26th May 1998 the muddemal articles were sent to the Chemical Analyser at Hyderabad and the examination reports are at Exhibit P.W.16/A colly. A chargesheet against the appellant and the original accused no. 1 Shamsuddhin came to be filed in the Court.

3. The Additional Sessions Judge, South Goa, Margao, vide Exhibit 6 framed a charge against the appellant and the original accused no. 1 Shamsuddhin for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Both the accused denied their guilt and claimed to be tried. The prosecution in support of its case examined 16 witnesses. The defence of the appellant and the original accused no. 1 Shamsuddhin is of denial. They have further stated that on the relevant day they were proceeding on the road from Rawalfond after getting down from a bus. Whilst they were so proceeding, they were caught by the

public and assaulted.

4. P.W.1 Amlī Kawade is the wife of deceased Shashikant. She states that on 18th May 1998 at about 1.30 p.m. her husband, deceased Shashikant had informed her that he had slapped two persons who were pickpocketers. She states that her husband further informed her that on giving the slaps the said two persons had asked her husband as to why he had slapped them and her husband had replied that he had slapped them because they were pickpocketers. P.W.1 Amlī further states that at about 2.00 p.m. the appellant and the original accused no. 1 Shamsuddhin came to her house and told her husband that they would show him and that they were not going to leave him. Since the accused had threatened her husband, P.W.1 Amlī told her husband not to go out. At about 5.00 p.m., after having their food, P.W.1 Amlī went to work while her husband deceased Shashikant remained at home. When she returned home at about 6.00 p.m., she noticed that her husband was sitting outside a bar called 'Napolean'. After returning home, P.W.1 Amlī went to the market and returned home at about 8.30 p.m.. P.W.11 Savio Monteiro informed her that her husband had been stabbed with a knife and he was lying in a paddy field. P.W.1 Amlī, therefore, immediately went to the place where her husband was lying. She noticed one wound on the chest, which was bleeding. She alongwith the other persons, who

were present there, brought her husband to the house. She also states that the people, who had gathered at the scene of offence, had caught the accused, who were present there, and had assaulted them. She also states that on seeing the accused at the scene of offence, she recognized them as being the same persons, who had come to the house earlier in the afternoon. According to her, the police came and took her husband to the hospital. After the deceased Shashikant was admitted in the hospital, P.W.1 Amla was informed that her husband Shashikant was no more. Thereafter she filed a complaint at the police station, which is at Exhibit P.W.1/A. In the cross-examination she has admitted that she was residing in Goa for the last 20 years and was married to her husband Shashikant for the last 7 years. She admits that she is a native of Kolhapur and has no parents as they expired about 15 years ago. She states in the cross-examination that the distance from her house to the Napoleon bar would be about 10 to 15 metres. She also admits that her husband was in jail for about 4 to 5 days and that was one year prior to this incident. She also admits in the cross-examination that a year prior the two accused had come to her house but she does not know whether her late husband Shashikant was acquainted with the accused. She says thereafter she had seen the accused when they had come to her husband on the day of the incident in the afternoon. She also admits that she did not know the names

of the accused after the incident but learnt their names in the hospital when she was so informed by a Nurse. According to her, the distance from her house to the place where her husband was lying in the paddy field would be about 50 metres. Her house is situated behind Napolean bar and in front of Napolean bar is the paddy field, where her husband was lying. She also admits that there were lights on the road but there were no lights at the place where her husband was lying. She also admits that the light had gone off at 7.30 p.m. but states that when she had gone to the paddy field there were lights and a number of people had gathered there. She denied that the lights on the street do not reach the place where her husband was lying. She denied the suggestion that the accused did not come to her house and had threatened her husband at 2.00 p.m. on the day of the incident. Her evidence is corroborated by her complaint, which is at Exhibit P.W.1/A.

5. The pivot of the prosecution case is the evidence of P.W.2 Rafik Gondi, who was aged 14 years at the time of the incident. According to him, he knows the deceased as he is his neighbour. He states that on 18th May 1998, at about 8.15 p.m., he was standing in front of Napolean bar and at that time he heard somebody shouting 'chor chor'. Deceased Shashikant, who was sitting outside the bar, on hearing the shouts, started running towards the field followed by P.W.2

Rafik. According to P.W.2 Rafik, in the field two persons, who were standing there, caught the deceased and one of them, who was slightly fat, took a knife and stabbed deceased Shashikant on his chest. P.W.2 Rafik described the assailant as a slightly fat person of darkish complexion. According to P.W.2 Rafik, due to the blow of the knife, deceased Shashikant fell on the ground. Then people gathered and caught both the persons, who had caught deceased Shashikant, and the people, who had apprehended the accused, assaulted the accused by means of iron rods and kicks. The people, who had apprehended the two accused, then asked their names and the accused with dark complexion stated his name as Shamsuddhin and the other accused stated his name as Assis (appellant). Thereafter, according to P.W.2 Rafik, the police came and took both those persons and deceased Shashikant. He identified the appellant and the original accused no. 1 Shamsuddhin. In the cross-examination P.W.2 Rafik admits that Napoleon bar is by the side of a building called as 'Nalanda Apartments'. He also admits that at the place of the incident there were no lights and it was dark. He admits that there is an electric light on the road. In the cross-examination he further admits that when deceased Shashikant was running after hearing the shouts 'chor chor' followed by P.W.2 Rafik, the distance between him and Shashikant would be about 20 metres. When the two accused caught the deceased, P.W.2

Rafik was at a distance of about 10 to 12 metres. By the time one of the accused gave a blow with the knife on Shashikant, P.W.2 Rafik was at a distance of 6 metres. He admits that when the blow was given it was dark. He, however, asserts that he saw the face of both the accused. He also asserts that he had seen the stabbing which was done by a person who was slightly fat. He also asserts that within 5 minutes lot of people had gathered, who were working in the factory. In the cross-examination he has pleaded ignorance as to whether, besides himself, any other person had witnessed the incident of stabbing. He further states that the factory is situated at about 75 to 100 metres from the place of the incident. He states that his statement was recorded by the police three days after the incident. He also states that he learnt about the names of the accused after they were assaulted by the people. He denied the suggestion that he did not follow the deceased Shashikant on hearing the shouts 'chor chor'. He also denied the suggestion that he had not seen the accused catching the deceased and accused no. 1 stabbing the deceased on the chest. He also denied the suggestion that the people had not assaulted the two accused and the police had not taken them in a jeep. He very candidly admits that he would not be able to identify the knife with which the accused no. 1 had stabbed deceased Shashikant.

6. P.W.3 Srirang Kavde is a panch witness to the inquest panchanama. P.W.5 Mohammad Gawas Khan is a witness to the scene of offence panchanama. P.W.6 Ganadeep Sheldekar is a photographer who had taken the photographs. P.W.7 Viswas Chari is panch witness to the arrest/attachment panchanama of the clothes of the original accused no. 1. P.W.8 Vinod Naik is a draughtsman who had drawn the sketch at Exhibit P.W.8/B. P.W.9 Dr. Martina Fernandes is the medical officer who had examined the original accused no. 1 and the appellant. P.W.10 Shantaram Mane is also a panch witness to the seizure of the clothes of the appellant. P.W.11 Savio Monteiro is the one who informed P.W.1 Amli that her husband had been stabbed. P.W.12 Prashant Kawade is a witness to the seizure of the clothes of the deceased which is at Exhibit P.W.12/A. P.W.13 Jyotibha Manganache, who is working as a mechanic, is a witness who had gone to the scene of offence and had seen the deceased Shashikant lying in the field with an injury on his chest. P.W.14 Ganpat Oskar, P.W.15 P.S.I. Uttam Raut Dessai and P.W.16 P.I. Vaman Tari are the police witnesses. The evidence of the above witnesses is not challenged before us by the learned counsel appearing for the appellant.

7. Mr. J. Godinho, the learned counsel, who was appointed to represent the appellant as the appellant had preferred the appeal from the jail, has submitted before us

that the evidence of P.W.2 Rafik, the solitary eye witness, cannot be relied upon as (1) both P.W.2 Rafik and P.W.1 Amli have admitted that there were no lights at the scene of offence and it was dark; (2) since it was dark, it was impossible that P.W.2 Rafik could have seen accused no. 1 delivering the knife blow and the appellant catching the deceased; (3) according to the Investigating Officer, he had recorded the statements of 9 eye witnesses whereas, according to P.W.2 Rafik, he was the only person who had witnessed the incident and lastly (4) admittedly, according to P.W.2 Rafik, the knife blow was dealt by original accused no. 1 and there is no evidence to sustain a charge against the appellant under Section 34 of the Indian Penal Code.

8. Mr. A.P. Lawande, the learned Public Prosecutor appearing for the Respondent State, has submitted (1) that the presence of P.W.2 Rafik at the scene of offence is most natural as he resides in the same locality; (2) despite darkness, P.W.2 Rafik asserted that he had seen the appellant catching the deceased while the original accused no. 1 dealt the knife blow. He had further submitted that there were lights on the road and it was not as if it was pitch dark at the scene of offence. Moreover, according to P.W.2 Rafik, he had witnessed original accused no. 1 stabbing the deceased from a distance of about 6 metres; (3) the defence of the accused that they were passing by the

road when the people had apprehended and assaulted them was not put to P.W.2 Rafik; and (4) there is nothing in the cross-examination of P.W.2 Rafik, to discredit his version of having witnessed the incident.

9. It has certainly come on record that there were no lights at the scene of offence. The scene of offence, as per the panchanama at Exhibit P.W.5/A, is situated opposite Nalanda Apartments at Rawalfond in an open field at a distance of 50 metres from the main tarred road. There were a number of banian trees in the field. According to both P.W.1 Amla and P.W.2 Rafik there were street lights. The time of the incident is stated to be at about 8.15 p.m. The incident had taken place in the month of May and there could not be pitch darkness to affect the visibility of P.W.2 Rafik. Moreover P.W.2 Rafik has asserted he had seen the appellant and the original accused no. 1 catching the deceased Shashikant and thereafter the original accused no. 1 delivering the knife blow on the chest of deceased Shashikant. There is nothing in the cross-examination of P.W.2 Rafik which discredits his version of having witnessed the incident and being in a position to identify the assailants, despite darkness. We are, therefore, of the considered opinion that despite darkness, there was sufficient visibility for P.W.2 Rafik to have witnessed the incident. More so, when he states to have witnessed the

incident from a distance of about 6 metres. In the cross-examination P.W.2 Rafik has not been discredited and he maintains that the accused had caught the deceased and, thereafter, accused no. 1 had stabbed him. Therefore, the learned Public Prosecutor is right in contending that despite darkness, P.W.2 Rafik was in a position to identify the assailants and witness the incident.

10. Quality of evidence and not quantity of evidence is necessary for bringing home a charge against the accused. A conviction can be based on the testimony of a solitary eye witness and it is not the requirement of law that a number of eye witnesses are necessary in order to establish the offence against the accused. However, the evidence of the solitary eye witness should be of such quality as to inspire the confidence of the Court of the solitary witness being a truthful witness. We have carefully considered the evidence of P.W.2 Rafik, who was a solitary witness to the incident, and we find that the evidence of P.W.2 Rafik has not at all been shaken in the cross-examination so as to discredit him. We find that the evidence of P.W.2 Rafik is of a natural witness with a ring of truth. On careful perusal of his evidence we find that despite searching cross-examination P.W.2 Rafik has emerged as a truthful witness.

11. The learned counsel appearing for the appellant

has drawn our attention to the evidence of P.W.16 P.I. Tari where he admits that he had recorded the statement of about 9 eye witnesses. According to the learned counsel for the appellant, adverse inference should be drawn against the prosecution for its failure to examine the other eye witnesses. According to the learned counsel for the appellant, P.W.2 Rafik has admitted that he does not know whether, besides himself, any other person had witnessed the incident of stabbing. P.W.16 P.I. Tari has further stated in his cross-examination that he had made all efforts to procure the presence of those witnesses cited at serial numbers 16 to 23 but they were not traceable. He has also stated that he had taken the addresses of the native places but they could not be found at those addresses. In the examination-in-chief itself P.W.16 P.I. Tari has stated that they are all tribal migrant labourers, who had left Goa, and their whereabouts were not known. Merely because the prosecution has not been able to procure the presence of the other eye witnesses cited by it, an adverse inference cannot be drawn against the prosecution. It is apparent that the other eye witnesses were migrant tribal labourers who had left Goa and their whereabouts were not known to the police. Despite serious efforts, the presence of the other eye witnesses could not be secured by the prosecution. The prosecution has examined P.W.2 Rafik as an eye witness and merely because of the failure of the prosecution to examine

the other eye witnesses, who unfortunately could not be summoned, no adverse inference can be drawn against the prosecution. Similarly, the argument of the learned counsel for the appellant that P.W.2 Rafik does not know whether besides himself, others had witnessed the incident and as the prosecution had cited 9 eye witnesses, the veracity of P.W.2 Rafik is adversely affected, is without any substance. P.W.2 Rafik has candidly admitted that besides himself, he does not know whether any other persons had witnessed the incident. Veracity of this witness is not affected by the fact that the prosecution has cited other eye witnesses. The other eye witnesses unfortunately could not be examined in the case as summons could not be served on them due to the fact that they had left Goa and their whereabouts were not known to the prosecution. The credibility of the witness is not affected because he states that he does not know if others had witnessed the incident. This is so, particularly in view of the fact that the other eye witnesses have not been examined. Even if the other eye witnesses had been examined, according to us, the credibility of P.W.2 Rafik would not have been affected by their examination. The evidence of a witness has to be appreciated on the basis of his examination-in-chief and the cross-examination and has not to be affected by other extraneous circumstances unless those circumstances or evidence render his version either improbable or false. No

such inference can be drawn in this case merely because the prosecution had cited other eye witnesses.

12. It was then urged by the learned counsel appearing for the appellant that admittedly, according to the prosecution, the original accused no. 1 had stabbed deceased Shashikant and as no overt act is attributed to the appellant, the charge under Section 302 read with Section 34 of the Indian Penal Code must fail as against the appellant. The evidence on record clearly indicates that the appellant and the original accused no. 1 had gone to the house of the deceased Shashikant and had threatened him. The threats were given just six hours before deceased Shashikant was stabbed. From the evidence it is apparent that both the accused, the appellant and the original accused no. 1, were waiting at the scene of offence and had lured deceased Shashikant to the scene of offence by shouting 'chor chor'. From the evidence it is proved that the appellant and original accused no. 1 had caught the deceased and the original accused no. 1 had then stabbed the deceased. From the evidence it is clear to us that there was a meeting of mind between the appellant and the original accused no. 1 and they had devised a plan for luring the deceased to the scene of offence. The act of the appellant in catching the deceased speaks volumes about the appellant sharing the common intention with the original accused no. 1. It is

not as if this incident of stabbing had occurred on the spur of the moment where the appellant can claim ignorance of the intention of the original accused no. 1 in stabbing the deceased. This crime was a premeditated crime and executed with great finesse but, unfortunately for the accused, was witnessed by P.W.2 Rafik.

13. A faint submission is advanced before us that P.W.2 Rafik knew the appellant neither by name nor by face and as such, an identification parade was necessary. This submission deserves to be rejected as it is devoid of any merit. The appellant and original accused no. 2 were immediately apprehended at the spot and were mercilessly beaten by the people who had gathered there. They were handed over to the custody of the police after the arrival of the police. This is not a case where after stabbing the deceased, the accused had fled from the spot and were apprehended subsequently. Both the accused were apprehended at the scene of offence itself immediately after committing the crime. In such circumstances, even if P.W.2 Rafik did not know the accused either by name or face, holding of identification parade was not necessary at all. Even otherwise, the complicity of the accused is established as P.W.1 Amlī identified the assailants at the scene of offence as the persons who had visited her house on the same day in the afternoon and had threatened her husband.

14. It was also urged before us by the learned counsel appearing for the appellant that the statement of P.W.2 Rafik was recorded by P.W.16 P.I. Tari after three days of the incident. No doubt P.W.2 Rafik states that his statement was recorded after three days of the incident. P.W.16 P.I. Tari also admits to have recorded the statement of P.W.2 Rafik on 21st May 1998. Delay simpliciter cannot be urged as a ground to jettison the version of an eye witness who has deposed naturally and truthfully. Delay in recording the statement of a witness may at the most put the Court on guard and the Court would be extremely cautious in appreciating the evidence of such witness. But, if the Court finds the evidence of the witness to be of a sterling quality and without any blemish, the evidence of such witness cannot be discredited merely because the investigating agency has recorded the statement of such a witness after some delay. The learned Public Prosecutor appearing for the State has relied on the Judgment in **Ganeshlal v. State of Maharashtra**, (1992) 3 S.C.C. 106, in which the Supreme Court has held that a delay of 2 1/2 months in recording the statement of the witness does not invariably render the testimony of the witness doubtful though the evidence has to be scanned carefully. If the witness is found to be natural and truthful, his evidence need not be doubted due to delay. We have carefully scanned the evidence of P.W.2 Rafik and we are in complete agreement

with the submission of the learned Public Prosecutor for the State that the evidence of P.W.2 Rafik is that of a natural and truthful witness and his testimony cannot be doubted merely because of the fact that there is a delay of three days in recording his statement.

15. We cannot conclude this Judgment without expressing our appreciation for the efforts taken by Mr. Godinho, the learned counsel appointed for the appellant and Mr. Lawande, the learned Public Prosecutor appearing for the State.

16. In the result, therefore, we see no merit in the appeal and the Appeal is, thus, dismissed confirming the conviction and sentence as recorded by the trial Court in Sessions Case No. 20 of 1998.

(A.S. AGUIAR)
JUDGE.

(P.V. HARDAS)
JUDGE.

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